

IN THE  
Supreme Court of the United States

October Term, 1987

No. 87-168

RUSSELL FRISBY, *et al.*,  
*Appellants,*

*v.*

SANDRA C. SCHULTZ, *et al.*,  
*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT  
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE  
AND THE RUTHERFORD INSTITUTES OF  
ALABAMA, ARKANSAS,  
CALIFORNIA, COLORADO, CONNECTICUT,  
DELAWARE, FLORIDA,  
GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA,  
OHIO, PENNSYLVANIA, TENNESSEE, TEXAS,  
VIRGINIA AND WEST VIRGINIA,  
AMICI CURIAE, IN SUPPORT OF APPELLEES

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

This case presents important issues regarding the

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<sup>1</sup> Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

definition of privacy and constitutionally permissible infringements on First Amendment activity. There is currently a tendency to invoke "privacy" as a defense of broad restrictions on constitutionally-protected rights, in this case freedom of speech, without analyzing what the term actually means. Such a process jeopardizes constitutional rights because it subordinates those rights to a murky, ill-defined concept that affords no principled basis for delimiting either individual rights or legitimate state interests. The interests that have been legally recognized as protected by "privacy" are few, and The Rutherford Institute believes that those interests should not be expanded to limit First Amendment expression in the public arena.

*Amici curiae* are nonprofit religious corporations named for Samuel Rutherford, a seventeenth-century Scottish minister and rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and West Virginia and its national office in Manassas, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment freedoms. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

### STATEMENT OF FACTS

Between April 20 and May 20, 1985, the Milwaukee Coalition for Life, a pro-life group, sponsored several picket lines in Brookfield, Wisconsin. The picketers stood in front of residence of Dr. Benjamin Victoria, a physician who performs abortions, to protest Dr. Victoria's involvement in the abor-

tion industry. J.S. App. A-5 to A-6. There is evidence that some picketers were noisy and that another trespassed on Dr. Victoria's property. JA-50 to JA-52. Rather than addressing these alleged abuses of the right to picket, the Town of Brookfield adopted an ordinance prohibiting picketing around any residence of any individual. J.S. App. A-8. The United States District Court for the Eastern District of Wisconsin granted a preliminary injunction against enforcement of the ordinance, finding it to be an overly broad restriction on free speech. A panel of the Court of Appeals for the Seventh Circuit affirmed. After rehearing *en banc*, an equally divided Court of Appeals affirmed, without opinion, the judgment of the district court.

### SUMMARY OF ARGUMENT

One of the asserted justifications for the Brookfield ordinance is a need to protect residential privacy. A close examination of legally recognized privacy rights, however, reveals that none of those rights affords a sufficient justification for a broad ban on First Amendment activity. The first legally protected privacy right is spatial privacy, which is closely related to ownership interests. Any actual invasion of these privacy interests, however, can be solved by narrowly-focused laws that do not infringe on First Amendment free speech rights. The second group of values - the right to make family decisions - is also not jeopardized by residential picketing. A ban on such activity, then, does nothing to protect the right. The final set of interests protected by privacy is the right to be free from unwanted communications and undue psychological pressures - the "right to be let alone." Although this privacy interest may be implicated by residential picketing, it is not so threatened as to justify the sweeping restrictions on First Amendment expression in the public arena that are imposed by the Brookfield ordinance. The residents of

Brookfield are not a captive audience requiring complete protection by the government at the expense of the First Amendment, and any psychological harassment is insufficient to justify decreased protection for the right to free speech. The privacy interests present in this case do not outweigh First Amendment values.

## I. INTRODUCTION

Appellants claim that the Brookfield ordinance is a legitimate and necessary protection of the citizens' right to privacy. Significantly, however, appellants do not define the specific nature of this alleged "right to privacy" or its scope. Instead, they use the term as a nebulous but powerful talisman to justify visceral reactions to infringements of unstated values. This amorphous use of the "right to privacy" invites both legislative and judicial bodies to make their decisions without analyzing or admitting the values involved. It also creates a serious risk that important legal, and in this case constitutional, rights will be overridden in favor of emotionally appealing but legally unsound arguments.

Although privacy interests are rightly accorded substantial weight in our legal system, their relative weight is dependent upon the delineation of the precise nature and extent of such interests. "[P]rivacy is not a metaphysical entity, but an ethical and legal boundary that we prescribe for others and ourselves. . . . Its value is then a derivative of the value we attach to the possibility of the conditions and activities it protects." Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L.Rev. 233, 245 (1977).

The nature of the privacy interests protected by American law may be analyzed as falling into three legally cognizable categories. The first privacy interest that the law

protects is closely connected to ownership interests and concerns the right of an individual to decide what will occur on his or her property. This interest - spatial privacy - is not jeopardized by residential picketing on a public street. The second group of privacy rights are those involving the decisions that an individual makes regarding his or her family. These family rights, rooted in both common and constitutional law, are not threatened by residential picketing. The final set of interests can best be classified as "the right to be let alone." This interest has always been subordinated to First Amendment rights.

All of these privacy interests "must be placed in the scales with the right of others to communicate." *Rowan v. Post Office Department*, 397 U.S. 728, 736 (1970). The balance that the Town of Brookfield has struck in this case denies the citizens of Brookfield their constitutional right to free speech in the public arena without offering significantly increased protection for privacy. To the extent that privacy interests are implicated in the instant case, they do not justify a broad prohibition on residential picketing and may be equally well protected by less restrictive regulations.

## II. A COMPLETE BAN ON RESIDENTIAL PICKETING IS NOT NECESSARY TO PROTECT SPATIAL PRIVACY RIGHTS

The first interest protected by the right to privacy -- spatial privacy -- is closely connected to property rights and protects the activities of a person on, and the enjoyment and use of, his or her own property. This interest has its roots far back in the English common law. In a speech directed at general warrants, William Pitt eloquently described these rights in now-familiar words:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his forces dare not cross the threshold of the ruined tenement.

1 T. Cooley, *Constitutional Limitations* 610 n. 2 (8th ed. 1927). In colonial America, James Otis invoked the same theme in his speeches against writs of assistance, in which he stated, "A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle." 2 *Legal Papers of John Adams* 141-44 (Wroth & Zobel eds. 1965). Cf., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) ("A man's home is his castle").

This spatial privacy interest, however, like the property interests from which it is derived, is not without limitations and is not invariably absolute. "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of the press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

The limited nature of spatial privacy interests is demonstrated by an examination of the Bill of Rights, which also links these interests to property rights. The First Amendment, for example, prevents the state "telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Stanley v. Georgia*, 394 U.S. 557, 560 (1969) (striking down a statute making private possession of obscene material a crime). That right, of course, is limited to the confines of one's own home. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66-67 (1973) (upholding regulation of obscenity at adult theater); *United States v. Orito*, 413 U.S. 139, 141-43 (1973) (upholding federal statute prohibiting transportation

of obscene materials).

The Third and Fourth Amendments also protect spatial privacy. The Third Amendment, with its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is a protection of privacy that is limited to the owner's property line. Cf., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting Third Amendment's protection of privacy).

Spatial privacy is a core value of the Fourth Amendment.<sup>2</sup> "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ." *Payton v. New York*, 445 U.S. 573, 589 (1980);<sup>3</sup> cf., *Oliver v. United States*, 466 U.S. 170 (1984) (areas other than those immediately surrounding the home are not subject to Fourth Amendment requirements).

All of the above-mentioned spatial privacy interests end at the boundaries of the subject property, however, and cannot be used to justify a restriction on First Amendment expression that occurs outside those boundaries. The Court noted this dividing line in *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), where it upheld a federal statute

<sup>2</sup> The protection of the Fourth Amendment is, of course, not limited to a particular place. *Katz v. United States*, 389 U.S. 347 (1967). The Fourth Amendment also protects the privacy right "to be let alone," in addition to the spatial privacy interests mentioned above. See *infra*, pages 17-18.

<sup>3</sup> See also *United States v. Karo*, 468 U.S. 705, 712, 714 (1984) (installation of beeper in a car transferred to suspect did not violate Fourth Amendment rights; monitoring of beeper in a private residence did violate those rights); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("Katz held that . . . the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place").

allowing a person to request removal of his or her name from the mailing lists of certain advertisers. The Court recognized the First Amendment rights of the advertisers, but held that "[t]he asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Id.* at 738. *Cf., United States v. Karo*, 468 U.S. at 712 (no Fourth Amendment violation; "[I]t cannot be said that anyone's possessory interest was interfered with in a meaningful way").

Perhaps the clearest example of the limits of spatial privacy is *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971). In *Keefe*, the Court reversed an injunction against the distribution of leaflets about a real estate broker by a community organization. The real estate broker claimed that the leaflets invaded his privacy, but this Court held that that claim was not sufficient to support a restriction of First Amendment activity. "Among other important distinctions, respondent is not attempting to stop the flow of information into his household but to the public." *Id.* at 420. Thus, although the real estate broker had every right to prevent distribution of the leaflets on his property, he had no right to halt distribution on the property of others or on the public streets.

Spatial privacy is no more protected by the ban in the instant case than it was by the ban in *Keefe*. The right of a person to control his property is not jeopardized when other individuals walk or speak on the public streets; therefore, a ban on such activity does not protect that right. This Court has recognized that principle in regard to other infringements on First Amendment activity. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court invalidated a city ordinance prohibiting door-to-door solicitation by organizations not using at least 75 percent of their receipts for "charitable purposes." One of the interests asserted in support of the ordinance was a need to protect individual privacy. The Court rejected this argument. "The ordinance is not directed to the unique privacy interests of

persons residing in their homes because it applies not only to door-to-door solicitation, but also to solicitation on 'public streets and public ways.'" *Id.* at 638-39. The Brookfield ordinance, like the Schaumburg ordinance, applies to public streets and highways. Indeed, the behavior prohibited by the Schaumburg ordinance, door-to-door solicitation, impinged much more upon spatial privacy than does picketing on the public streets. Nevertheless, the Supreme Court invalidated the ordinance. Likewise, the Brookfield ordinance, which addresses itself *solely* to First Amendment activity on the public streets and restricts the same, cannot be justified as a means of protecting spatial privacy.

In only one case has the Court allowed speech occurring in the public arena to be restricted for the sake of spatial privacy. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court upheld a determination by the Federal Communications Commission that a monologue was indecent and therefore could not be broadcast over the air. The Court noted that the indecent broadcast invaded "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748. In *Pacifica Foundation*, the only governmental restriction that could protect the privacy interest was a content-related ban on certain types of broadcast messages. In the instant case, however, any spatial privacy interests can be adequately protected by less restrictive time, place, and manner regulations that take into account the unique character of residential areas.

For example, Wisconsin has enacted statutes providing both criminal and civil penalties for trespassing upon private property.<sup>4</sup> Wis. Stat. Ann. §943.13 (West 1982) (criminal

<sup>4</sup>To the extent that the Brookfield ordinance purports to restrict trespassers, it is superseded by state law. *Cf., Anchor Savings and Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984). The enforceable portion of the ordinance, then, is directed at peaceful picketing on the public streets. *City of Houston v. Hill*, \_\_\_\_ U.S. \_\_\_\_, 107 S. Ct. 2502, 2508-09 (1987).

trespass to land); §943.14 (West 1982) (criminal trespass to dwellings); §844.01 (West 1977) (civil action for physical injury to, or interference with, real property). Cf., *Village of Schaumburg*, 444 U.S. at 639 (provision permitting homeowners to bar solicitors from their property by posting signs cited as less intrusive and more effective measure to protect privacy); *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (homeowner may post signs to prevent door-to-door solicitors from intruding).

The city could also protect homeowners from excessive noise by enacting a valid noise ordinance. See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949). An ordinance restricting noise would not only provide a less intrusive means of protecting privacy interests, but, because this problem is not unique to picketing, it would provide a more effective means of protecting spatial privacy interests than does the current ban on picketing. The Town of Brookfield could also restrict the numbers of picketers or the times of picketing. Cf., Note, *Strangers in the Night: Ordinances Restricting the Hours of Door-to-Door Solicitation*, 63 Wash. U.L.Q. 71 (1985) (advocating restricting First Amendment activity to daylight hours).

In conclusion, it is clear that the spatial "right to privacy" cannot serve as a justification for the Brookfield ordinance. Spatial privacy encompasses no more than the right to be free from physical, visual, or aural intrusion within the boundaries of one's possessory interests. The ordinance in this case prohibits activity far outside those limited boundaries. Quiet and peaceful picketing on nearby public streets does not implicate spatial privacy. To the extent that a government wishes to prevent abuse of the right to picket, it may do so by enacting narrowly focused ordinances tailored to the interests protected. "Narrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible

to draft." *Gregory v. City of Chicago*, 394 U.S. 111, 124 (1969) (Black, J., concurring).

### III. THE RIGHT TO MAKE FAMILY DECISIONS DOES NOT JUSTIFY A BAN ON RESIDENTIAL PICKETING.

A second set of interests protected under the rubric of privacy is the right to make certain decisions regarding one's family. Protected in part by the constitutional right to privacy,<sup>5</sup> those decisions that have been recognized by the Court include child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); family relationships, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); marriage, *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); and whether to beget and bear children, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1947). Once again, these rights are not all-encompassing. They are limited to the interests served -- a parent's right to structure the family unit. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in *their own household* to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629 (1968) (emphasis added). Family rights, limited as they are to the family unit, impart no authority to restrict activity in the public arena absent an intrusion into the family circle.

In the instant case, there is no threat to the parents' right to rear their children. Residential picketing implicates that right only to the extent that it may present information to

<sup>5</sup> The constitutional right of privacy, of course, only protects an individual against government intrusion, so it is not directly at issue in this case. The constitutional right does illustrate, however, the interests that are at stake.

children that their parents would prefer they not have. The Court has consistently held, however, that this interest is subordinate to First Amendment free speech interests. In *Carey v. Populations Services International*, 431 U.S. 678 (1977), the Court held unconstitutional a New York statute that prohibited the distribution of contraceptives to anyone under the age of 16. One of the justifications offered by the state was the need to protect citizens, including children, from being exposed to material that they might find offensive. The Court recognized this interest, but nevertheless struck down the statute, noting that those interests "are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." *Id.* at 701.

More recently, the Court considered a parent's interest in restricting information in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The case involved a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. Among the interests asserted in support of the statute was the state's effort to aid parents' discussion of birth control with their children. The Supreme Court recognized this interest as "undoubtedly substantial," *id.* at 75, but nevertheless invalidated the statute as an ineffective means of furthering that interest. The Court noted that parents already have control over the information received through the mailbox, and that they must also cope with the other avenues through which their children receive information regarding contraceptives, such as magazine advertisements, drug store displays, and sex education courses. "Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so,

and whose children have remained relatively free from such stimuli." *Id.* at 73.

A ban on residential picketing is a similarly ineffective means of protecting the right of family privacy. Although picketing may expose children to information that parents would prefer them not to have, that problem is not unique to residential picketing. A ban on such activity does not protect a family from intrusion by door-to-door canvassers, magazines, or other media. A ban on residential picketing is an effective protection of family privacy only to the extent that children have remained free of information from other sources. Given the low probability of that circumstance, and the lack of evidence demonstrating its presence in this case, appellants cannot justify the ordinance as a protection of family privacy.

Furthermore, a parent's right to protect children from receiving information is limited both by the First Amendment and by the child's right to receive that information. "Speech that is neither obscene as to youths nor subject to other legitimate prescription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975).

In the current case, for example, it is clear that the young people of Brookfield can receive contraceptive and abortion services regardless of their parent's wishes. *Carey*, 431 U.S. at 691-701 (plurality opinion); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). It would be highly illogical to allow the city to "protect" those same young people from opinions opposed to those same services. It is not only illogical, but unconstitutional for the Town of Brookfield to attempt to shield minors from protected speech in the

public arena. The ordinance brings within its sweep speech that is clearly protected by the First Amendment, which both outweighs and limits family privacy.

In summary, family privacy rights are not jeopardized by residential picketing, and are not protected by a prohibition of such activity. To the extent that parents have an interest in insuring that their children do not receive information from picketers, that interest is superseded both by the picketers' right to First Amendment expression and by the children's right to receive information. Family privacy cannot justify prohibition of speech in a public arena.

#### IV. THE RIGHT "TO BE LET ALONE" DOES NOT JUSTIFY THIS BROAD BAN ON FIRST AMENDMENT ACTIVITY.

The final group of interests protected by the concept of privacy is an individual's right to be free of unwanted opinions, disturbances, and psychological harassment. These interests have been summed up in Justice Brandeis's classic phrase, the "right to be let alone, . . . the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Protected from governmental intrusion by constitutional provisions, an individual also has common law tort protection against invasion of privacy by private persons. This right not to be bothered is the only relevant justification for the Brookfield ordinance. The right to be let alone, however, cannot provide in this case what it has failed to provide in others - a justification for depriving individuals of their chosen audience for peaceful First Amendment expression.

#### A. The Citizens of Brookfield Are Not a Captive Audience Needing Complete Protection from Residential Picketers.

As a general rule, a person offended by someone else's First Amendment expression has the responsibility of avoiding it.<sup>6</sup> It is only when the unwilling listener is unable to avoid the message that the government may step in to protect him or her.<sup>7</sup> Even then, the government may intervene only if "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen*, 403 U.S. at 21.

Residential picketing is not such an intolerable invasion of an individual's privacy interest. Peaceful picketing does not create the sort of visual and audible intrusions that justify state inhibition of First Amendment activity. *Cf.*, *Kovacs v. Cooper*, 336 U.S. at 87; *FCC v. Pacifica Foundation*, 438 U.S. at 749. The only physical manifestation of the picketers' presence is the sight of them standing outside one's home. An individual can easily avoid seeing the picketers and their message by looking the other way. *Cf.*, *Erznoznik*, 422 U.S. at 210-11; *Cohen*, 403 U.S. at 21. In this respect, residential picketing imposes much less on individual privacy than does such already approved forms of First Amendment

<sup>6</sup> *Consolidated Edison v. Public Services Commission*, 447 U.S. 530 (1980) (recipient of unwanted mailing that easily can be thrown away); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (inadvertent viewer of a drive-in movie screen may look the other way); *Cohen v. California*, 403 U.S. 15, 21 (1971) (person viewing offensive message on another's jacket may look the other way).

<sup>7</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307-08 (1974) (riders of public transportation); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (people in business and residential areas unable to avoid amplified message); *International Society for Krishna Consciousness, Inc. v. Rockford*, 585 F.2d 263, 268 (7th Cir. 1978) (dicta) (persons in line at airport waiting for tickets). See generally, Comment, "I'll Defend to the Death Your Right to Say It ... But Not To Me" - The Captive Audience Corollary to the First Amendment, 1983 S. Ill. U. L.J. 211.

activity as door-to-door solicitation. *Village of Schaumburg*, 444 U.S. 620; *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Martin v. City of Struthers*, 319 U.S. 141 (1943). Cf., *Breard v. Alexandria*, 341 U.S. 622, 639 n.27 (1951) ("Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection"), quoting, Z. Chaffee, *Free Speech in the United States* 406 (1941).

It must also be recognized that protecting individuals from unwelcome interruptions of their daily life can be a form of content-based discrimination. After all, it is usually not the communication itself that prompts the restriction on free speech, but the fact that the content of the communication is something that an individual would rather not hear. Protecting a person from intrusive speech, then, invokes the same content-based restrictions that pose the greatest danger to First Amendment values by suppressing dissent and unpopular viewpoints. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *Hague v. CIO*, 307 U.S. 496, 516 (1939). Because of this danger, speech cannot be restricted based solely on whether or not a listener is annoyed by it. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). For this reason, an ordinance purporting to protect individuals from unwanted communications must be narrowly drafted to avoid making the right of free speech contingent on the propriety of the speech. "[S]o long as the means are peaceful, the communications need not meet standards of acceptability." *Keefe*, 402 U.S. at 419.

Finally, individuals are able to ignore most unwanted messages. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U.L. Rev. 153, 183-84 (1972). "Indeed, one might argue that the possibilities of unwelcome messages penetrating the psychological armor of unwilling audiences are so small that we ought to be worrying more about how to help unpopular communicators get through to reluctant listeners than how to give further protection from speech to

those who may already know too well how to isolate themselves from alien ideas." *Id.* at 184.

In short, there is no evidence that the citizens of Brookfield are a captive audience requiring complete protection from residential picketing. Any unconscionable physical, audible, or visual intrusions may be dealt with by appropriately-written ordinances that do not completely ban First Amendment activity on a public street. Rather than passing an ordinance designed to protect its citizens from expression because of its content, Brookfield should recognize the vitality of First Amendment rights and protect them accordingly. The right of every person to be let alone does not justify the sweeping restrictions on public free speech imposed by the Brookfield ordinance.

#### **B. The Psychological Pressure of Residential Picketing Does Not Justify a Complete Ban on Such First Amendment Activity.**

The one remaining privacy interest at issue in this case is the psychological pressure that a resident feels just from knowing that there are picketers outside his home. *Wauwatosa v. King*, 49 Wis. 2d 398, 411-412, 182 N.W.2d 530, 537 (1971); cf., *Gregory v. City of Chicago*, 394 U.S. 111, 126 (1969) (Black, J., concurring); Arnolds & Seng, *Picketing and Privacy: Can I Patrol on the Street Where You Live?*, 1982 S. Ill. U.L.J. 463, 475 ("Simply put, residential picketing restrictions protect the right 'to be let alone' in one's home").

This interest in being free from psychological pressure is protected by many facets of American law. It is protection from the psychological effects of having private information about oneself distributed to others that underlies the protec-

tions of various constitutional rights.<sup>8</sup> At the beginning of the twentieth century, Professor Pound argued: "Another phase [of the human personality] is the demand which the individual may make that his private personal affairs shall not be laid bare to the world and be discussed by strangers. Such an interest is the basis of the disputed legal right of privacy." Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, 362 (1915).

In 1890, Samuel Warren and Louis Brandeis almost single-handedly created a tort right of privacy. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Seventy years later, Dean Prosser categorized the cases recognizing a right to privacy into four distinct torts.<sup>9</sup> Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960). Although these rights outline four distinct interests, "each represents an interference with the right of the plaintiff 'to be let alone.'" Prosser & Keeton, *The Law of Torts* §117, at 851 (5th ed. 1984); see also, *Restatement (Second) of Torts* §652 comment b (1977) (each tort involves "interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears, and publications of others").

Tort law, then, involves the same privacy interest asserted by the City of Brookfield to justify its absolute ban on residential picketing - the right to be free from the psychologi-

<sup>8</sup> *United States v. Jacobsen*, 466 U.S. 109, 116-18 (1984) (Fourth Amendment); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (constitutional right to privacy includes interest in avoiding disclosure of personal matters); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (Fifth Amendment). See generally, A. Westin, *Privacy and Freedom* 349, 350 (1967).

<sup>9</sup> Those four torts are: (1) intrusion upon the plaintiff's solitude or seclusion; (2) public disclosure of embarrassing private facts about an individual; (3) publicity that places an individual in a false light in the public eye; and (4) appropriation of an individual's name or likeness. *Restatement (Second) of Torts* §§652B-652E (1977).

cal pressure of forcible submission to the opinions or curiosity of others. This right is not absolute and must be subordinated to the First Amendment right to free expression in the public arena. Because of this fact, many actions otherwise prohibited by the tort right of privacy must be allowed in order to adequately protect First Amendment rights.

For example, one of the arguments urged as a justification for the ordinance in this case is that the picketers are using their free speech rights to harass and intimidate others. Although such an assertion might be relevant in a tort case, it is of no significance here. The First Amendment protects peaceful speech, regardless of whether it is coercive or merely expressive. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"); *Keefe*, 402 U.S. at 419 (fact that speech intimidates others is not in itself a justification for prohibition). Even speech that is motivated by hatred or ill will is afforded certain First Amendment protections. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

Similarly, the publication of false statements about an individual can give rise to tort liability. Adequate protection of First Amendment values, however, requires that an injured person who is also a public figure or involved in a matter of public interest prove that the defendant acted out of malice. *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974) (matter of public concern); *Time v. Hill*, 385 U.S. 374 (1967) (public figure); cf., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (malice standard not required in matter of private concern). Accord, *Hustler Magazine, Inc. v. Falwell*, No. 86-1278 (U.S. S.Ct. Feb. 24, 1988) (applying malice standard to intentional infliction of emotional distress). The sole reason for this reduced expectation of privacy is that the First Amendment requires it. "Exposure of self to others in varying degrees is a concomitant of life in a civilized commu-

nity. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." *Time v. Hill*, 385 U.S. at 388.

The principle of these cases is clear. Although protection from psychological pressures may be a legitimate state interest, adequate protection of First Amendment values requires decreased protection for privacy. The psychological pressure faced by the residents of Brookfield is undoubtedly less than the psychological pressure suffered by the plaintiffs in *Time v. Hill*. Picketers outside one's home are certainly a nuisance, but they are not a 24-hour phenomenon, they are not likely to be a permanent fixture, and the audience is limited. A false magazine article, on the other hand, is available to anyone, anywhere, at any time, and remains a threat to privacy for as long as a copy of the article exists.

Furthermore, an individual who is subjected to picketing is usually targeted because of a particular course of action that that individual willfully decided upon, as in this case where Dr. Valentine deliberately chose to perform abortions, knowing that the procedure is a highly controversial one. The Hill family, on the other hand, had no control over their situation. They became involved in a matter of public interest through no decision of their own, and in fact contrary to their wishes.<sup>10</sup> Yet, the Hill family had to accept decreased protection for their privacy in order to safeguard the First Amendment. There is no reason that residents of Brookfield should not do likewise.

<sup>10</sup> Cf., *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 255 (1974) (Douglas, J., dissenting) ("A bridge accident catapulted the Cantrells into the public eye and their disaster became newsworthy"); Wis. Stat. Ann. §895.50 (2)(c) (West 1983) (tort action for invasion of privacy for publication of private facts "if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved or with actual knowledge that none existed").

It is significant that the Wisconsin legislature in 1977 codified three of the four invasion of privacy torts. An injured individual may recover for intrusion upon his privacy, appropriation of likeness, or publication of private facts. Wis. Stat. Ann. §895.50 (West 1983). The legislature recognized the First Amendment limitations on the right of privacy, stating that the right was to be interpreted "with due regard for maintaining freedom of communication, privately and through the public media." §895.50(3). As part of that due regard, the legislature specifically stated that the available remedies for violation of these privacy rights do not include "prior restraint against constitutionally protected communication privately and through the public media." §895.50(1)(a). Such a prior restraint is exactly what the Brookfield ordinance is. The town of Brookfield has legislated a prohibition on First Amendment expression in the name of individual privacy that the state legislature has specifically barred as a means of protecting that right.

The pivotal question in this case is not whether picketing creates some degree of psychological pressure. Nor is the question whether a government may provide residents complete protection from that psychological pressure at the expense of First Amendment freedoms. It clearly may not. The question is whether the psychological pressure in this case is so great as to justify curtailment of First Amendment rights. The Town of Brookfield has an interest in protecting its residents' privacy, but it has a greater responsibility to safeguard First Amendment values. "The state interest in protecting the privacy of individuals is simply one instance of its general role as overseer of conflicting human activities. Its interest in guaranteeing the exercise of the speech is less frequently recognized but rests on the same premise." Comment, *Picketers at the Doorstep*, 9 Harv. C.R.-C.L. L. Rev. 95, 113 (1974).

In summary, any interest in preventing psychological harassment is not sufficient to justify the broad ban imposed on free speech in the instant case. In cases presenting much greater invasions of privacy, the Supreme Court has consistently required decreased privacy protection in favor of increased First Amendment safeguards. The Town of Brookfield has overreacted and created a serious interference with an enumerated, paramount constitutional right in the name of a privacy interest that does not warrant such complete protection. In this case, it is the privacy rights that must be limited. "[S]uch a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Falwell*, slip op. at 10.

### CONCLUSION

Privacy is the chameleon of the law, able to change its form according to the dictates of the prevailing legal fashions. It lends itself well to emotionally appealing arguments, and is useful for making those arguments seem more cogent than they actually are. In this case, privacy has been made a euphemism for protecting residents from speech that they would simply rather not hear. The right to privacy in reality protects only three legal interests: spatial privacy, family decisions, and the right to be let alone. None of these interests justifies the sweeping restrictions on free speech in the public arena enacted by the Town of Brookfield. Privacy has never been granted complete legal protection at the expense of the First Amendment and has in fact been consistently subordinated to that right. Any legitimate state interests in this case may be met by narrow time, place, and manner restrictions that do not jeopardize freedom of speech. The preservation of constitutional rights requires sacrifice, not just by government, but by each individual who desires the protection of those freedoms. Any annoyance and inconvenience caused by

residential picketing is not too great a price to pay to preserve the invaluable and indispensable right to freedom of expression.

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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